REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APP. NO.260 OF 2015

STEPHEN GATHIRIMU GICHUHI……APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS……RESPONDENT

RULING

The Applicant, Stephen Gathirimu Gichuhi was charged in **Kibera Chief Magistrate's Court Criminal Case No.1842 of 2015 Republic –vs- Stephen Gathirimu Gichuhi.** He was charged with the offence of **forcible entry** contrary to **Section 90** of the **Penal Code**. The particulars of the offence were that on 27th March 2015 at Kiserian Township in Kajiado County, the Appellant, jointly with others not before court, in order to take possession thereof entered the parcel of land Registered as LR No.KJD/Olchoro-Onyore/3665 (the suit parcel of land) of Stephen Njoroge Macharia in a violent manner by chasing him away and threatening to beat him up. The Applicant pleaded not guilty to the charge. The case is pending hearing and determination.

On 28th July 2015, the Applicant moved this court pursuant to the provisions of **Articles 23(1) and (3), 25(c), 47(1), 157(11), 165(3), (6)** of the **Constitution** and the enabling provisions of the law seeking to have the criminal case facing him stayed pending the hearing and determination of the Civil Case, **Nairobi ELC No.686 of 2015** which deals with the dispute relating to the ownership of the suit parcel of land. The Applicant averred that the proprietorship of the suit parcel of land was in dispute. He was the grandson of one Sospeter Mukuru Mbeere (deceased) who was the lawful registered proprietor of the suit parcel of land. The Applicant stated that he was the son of Peris Wanjiku Mukuru who is the administrator of the estate of the deceased by virtue of a grant of letters of administration issued to her on 2nd June 2015. It is the Applicant's case that insofar as the ownership of the suit parcel of land is in dispute, and a court of law having not determined the dispute, it is only fair that the proceedings in the criminal court be stayed pending such determination. The Applicant stated that if he was prosecuted in the criminal case, the complainant in the case would have undue advantage over him and it would not be in the interest of justice. The application is supported by the annexed affidavit of the Applicant.

The application is opposed. The Respondent filed grounds in opposition to the application. The Respondent stated that the application was misconceived because the Applicant has been charged with an offence known in law. The Respondent stated that the orders craved for in the application were not available to the Applicant by virtue of the express provisions of the law. The Respondent was of the view that the application had been filed in abuse of the due process of the court and is intended to delay or defeat the ends of justice. The Respondent stated that the application and orders sought were unattainable in law because the same was both factually and legally wanting. The Respondent urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Ms. Mumma for the Applicant and by Ms. Njuguna on behalf of the Respondent. This court has carefully considered the said submission. The issue for determination by this court is whether the Applicant established a case to entitle this court to stay the criminal proceedings facing him before the Kibera Chief Magistrate's Court. If I understood the Applicant, he is saying his constitutional right to fair trial would be infringed when what is essentially a civil matter is being criminalized. The Applicant is of the view that the actual dispute

between himself and the complainant in the criminal case relates to the determination of the ownership of the suit parcel of land. The correct forum to determine such dispute is the Land and Environment Court and not a magistrate's court hearing a criminal case. On the other hand, it is the Respondent's argument that since the Applicant has been charged with the offence that is known in law, he ought to face trial and present his defence before that court. The Respondent further argued that the pendency of any civil matter concerning the subject matter of the criminal case does not bar the court from trying such criminal case. In that regard, the Respondent relied on **Section 193A** of the **Criminal Procedure Code** which provides that:

> ***"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."***

It was therefore the Respondent's case that the Applicant had no basis in fact or in law to stop the criminal proceedings before the magistrate's court.

This court has analyzed the facts of this case. According to the documents annexed to the affidavit in support of the application, it appears that there are two titles in respect of the suit parcel of land. One title is in the name of Sospeter Mukuru Mbeere (deceased), the grandfather of the Applicant. The other title is in the name Stephen Njoroge Macharia, the complainant in the criminal case. It appears that on 19th August 2010, the title in respect of the suit parcel of land was transferred from the deceased to one Janet Wairimu Muritu. She is a predecessor in title to the complainant in the criminal case. According to the Applicant, the title in respect of the suit parcel of land was fraudulently transferred from the deceased to the said Janet Wairimu Muritu. The mother of the Applicant, in her capacity as the administrator of the estate of the deceased, has sued the complainant among other defendants, for appropriate remedy regarding the ownership of the suit parcel of land. This suit is pending hearing and determination before the Land and Environment Court. The Applicant urged the court to stay the criminal case facing him pending the hearing and determination of the suit before the Land and Environment Court.

Can this court stay the criminal proceedings before the magistrate's court? The answer is no. The Applicant has no connection at all with the civil case. He is not the plaintiff in the civil case. Neither is he a defendant. He is not the administrator of the estate of the deceased. According to the limited grant of Letters of Administration Ad litem, the persons appointed to prosecute the case are Moses Parantai and Peris Wanjiku Mukuru. The Applicant has no legal authority to prosecute the case. There is no legal nexus between the civil case and the criminal case facing the Applicant. From the charge sheet presented to this court, it is the prosecution's case that the Applicant attempted to forcefully enter the suit parcel of land by evicting the complainant from the same. This court agrees with the Respondent that the charge brought against the Applicant is provided by the law. The particulars disclose an offence known in law. This court therefore sees no legal reason why the criminal case facing the Applicant should be stayed.

In the premises therefore, the application lodged by the Applicant herein lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE